(1)

88-559

NO.

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOSEPH AZAR,

Petitioner,

vs.

MINISTER OF LEGAL AFFAIRS
GOVERNMENT OF TRINIDAD AND TOBAGO

Respondent,

Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleven Circuit

JON MAY
Counsel of Record
Penthouse I
155 South Miami Ave.
Miami, Florida 33130
(305) 372-8860

Arthur J. Morburger
Of Counsel
Penthouse I
155 South Miami Ave.
Miami, Fla. 33130
(305) 374-3373

Jeffrey H. Kay
Counsel for Petitioner
200 South Andrews Ave.
Suite 300
Ft. Lauderdale, Fla. 33301
(305) 522-8999

QUESTIONS PRESENTED

1. Does a district court possess Article III case or controversy jurisdiction to *ex parte* order in behalf of a foreign applicant bank records subpoenaed where there was no Article III case or controversy pending before any court of the United States?

2. Does the Court of Appeals' interpretation of 28 U.S.C. Section 1782 afford foreign persons and governments discovery procedures more advantageous than those available to citizens of the United States, threaten to inundate our courts with requests for pre-litigation discovery, and undermine the right to privacy established by Congress in the Right to Financial Privacy Act?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Joseph Azar and the Respondent Minister of Legal Affairs for the Government of Trinidad and Tobago.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTE AND CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SUBPOENA RECORDS ON BEHALF OF THE GOVERNMENT OF TRINIDAD AND TOBAGO WHERE THERE WAS NO ARTICLE III CASE OR CONTROVERSY PENDING BEFORE ANY COURT OF THE UNITED STATES	5
II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. SECTION 1782 AFFORDS FOREIGN PERSONS AND GOVERNMENTS DISCOVERY PROCEDURES MORE ADVANTAGEOUS THAN THOSE AVAILABLE TO CITIZENS OF THE UNITED STATES, THREATENS TO INUNDATE OUR COURTS WITH REQUESTS FOR PRE-LITIGATION DISCOVERY, AND UNDERMINES THE RIGHT TO PRIVACY ESTABLISHED BY CONGRESS IN THE RIGHT TO FINANCIAL PRIVACY ACT	11
CONCLUSION	16
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Aetna Life Insurance Co. of Hartford Connecticut v. Haworth, 300 U.S. 227 (1937)	7
Application of L. B. & W. 4217, 238 F.2d 163 (9th Cir. 1956)	8
Cass v. United States, 417 U.S. 72 (1974)	13
Chambers v. Mississippi, 410 U.S. 284 (1973)	14
Eichel v. United States, Fidelity & Guaranty Co., 245 U.S. 102 (1917)	8
Ellis v. Love, 421 U.S. 426 (1975)	8
Flast v. Cohen, 392 U.S. 83 (1968)	6,8
GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., 445 U.S. 375 (1980)	7
In re Letter of Request for Judicial Assistance from the Tribunal Civil De Port-au-Prince, Republic of Haiti, 669 F.Supp. 403 (S.D. Fla. 1987)	9
In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976)	10
In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 648 F.Supp. 464 (S.D. Fla. 1986)	2,4
In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, Case No. 86-6011, Slip op. 3572 (11th Cir. July 7, 1988)	2,4
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894)	7
Matter of Baker, 693 F.2d 925 (9th Cir. 1982)	8
Muskrat v. United States, 219 U.S. 346 (1911)	6

CASES	Page
Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourism v. United States District Court for the Southern District of Iowa, 482 U.S.___, 107 S.Ct. 2542 (1987)	11,12
State of California v. Oroville-Wyandotte Irrigation District, 409 F.2d 532 (9th Cir. 1969)	7
Stewart v. Kahn, 20 U.S (11 Wall) 493 (1871)	13
United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978)	16
United States v. Nixon, 418 U.S. 683 (1974)	7

Statutes, Rules, and Constitutional Provisions:

5 U.S.C. Section 552(b)	15
12 U.S.C. Section 3409	14
28 U.S.C. Section 1254(1)	2
28 U.S.C. Section 1782	3
Act of June 25, 1948, ch. 646, Section 1782, 62 Stat. 949	13
Article III, Section 2, Constitution of the United States	2
Ch. 79:50, Laws of Trinidad and Tobago	3
Fed.R.Civ.P. 26	14
Fed.R.Civ.P. 26(b)(1)	11
Fed.R.Civ.P. 27(a)	7
Fed.R.Civ.P. 37	14

CASES Page

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* Mar. 18, 1970, 23 U.S.T. 2555, TIAS No. 7444 12

The Right to Financial Privacy Act, 12 U.S.C. Sections 3402-03 13

Miscellaneous:

1964 U.S.Code Cong. & Admin. News at 3788 9

1978 U.S. Code Cong. & Admin. News 9305 14

Smit, International Litigation Under the United States Code, 65 Colum.L.Rev. 1015 (1965) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

JOSEPH AZAR,

Petitioner,

vs.

MINISTER OF LEGAL AFFAIRS
GOVERNMENT OF TRINIDAD AND TOBAGO

Respondent,

Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

---

The Petitioner Joseph Azar respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *In re: Request for Assistance from the Ministry of Legal Affairs of Trinidad and Tobago* on August 26, 1988.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as *In re Request for Assistance from the Ministry of Legal Affairs of Trinidad and Tobago,* Case No. 86-6011, Slip op. 3572 (11th Cir. July 7, 1988) and is reprinted in the appendix hereto (App., infra, 1a-11a).

The initial opinion of the United States District Court for the Southern District of Florida is reported as *In re Request for Assistance from the Ministry of Legal Affairs of Trinidad and Tobago,* 648 F.Supp. 464 (S.D. Fla. 1986) and is reprinted in the appendix hereto (App., infra, 12a-18a).

The supplemental opinion of the District Court is not reported and is reprinted in the appendix hereto (App., infra, 19a-25a).

JURISDICTION

On July 7, 1988, the Eleventh Circuit Court of Appeals affirmed the decision of the district court. A petition for rehearing with a suggestion for rehearing en banc was timely filed. Rehearing was denied on August 26, 1988.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Constitution of the United States reads as follows:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made,

> or which shall be made, under their authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime jurisdiction;- to Controversies to which the United States shall be a Party;— to Controversies between two or more states;— between a State and Citizens of another State;— between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States;— and between Citizens of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. Section 1782 reads in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced before a person appointed by the court. . . .

STATEMENT OF THE CASE

On December 31, 1985, the Minister of Legal Affairs of the government of Trinidad and Tobago requested that the United States Attorney General assist in obtaining bank records for an account in the name of Joseph Azar, a citizen of Trinidad and Tobago. In its application to the Attorney General, the Minister of Legal Affairs represented that the documents were needed in an investigation into violations by Trinidad and Tobago nationals of that nation's Exchange Control Act. *See* Ch. 79:50, Laws of Trinidad and

Tobago. Joseph Azar, however, was not named as a target of this investigation and no proceedings have been instituted in Trinidad and Tobago.

The Department of Justice, acting on behalf of the government of Trinidad and Tobago, sought *ex parte* a subpoena for the records pursuant to 28 U.S.C. Section 1782(a). On July 11, 1986, the district court granted *ex parte* the request and without notice ordered the bank to disclose the information requested. When Azar thereafter fortuitously learned of the subpoena, he moved to quash the subpoena on the ground that Section 1782 requires that the subpoenaed records relate to a foreign proceeding then pending. The district court denied the motion to quash, *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* 648 F.Supp. 464 (S.D. Fla. 1986), but stayed the subpoena pending an appeal to the Eleventh Circuit Court of Appeals. On July 7, 1988, the Eleventh Circuit affirmed the decision of the district court. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* Case No. 86-6011, Slip op. 3572 (11th Cir. July 7, 1988)(App. 1a). The Eleventh Circuit rejected appellant's argument that Congress intended for a proceeding to be pending as a condition precedent to a grant of assistance under Section 1782, (App. 8a), and held that documents sought pursuant to the statute need only be used "in connection with proceedings" and that under the facts presented herein the likelihood of proceedings being commenced was sufficiently great to conclude that this requirement was met. (App. 10a).

Petitioner timely filed a petition for rehearing, with a suggestion for rehearing in banc, challenging the district court's jurisdiction on the ground that no Article III "case or controversy" was presented by Respondent's Section 1782 application. On August 26, 1988, the Eleventh Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SUBPOENA RECORDS ON BEHALF OF THE GOVERNMENT OF TRINIDAD AND TOBAGO WHERE THERE WAS NO ARTICLE III CASE OR CONTROVERSY PENDING BEFORE ANY COURT OF THE UNITED STATES

This petition presents questions of great importance to the interests of litigants, private persons, and the government of the United States. In its decision below, the Court of Appeals has sanctioned a District Court's *ex parte* disclosure of bank records to a foreign power. As we will see, the procedure sanctioned below places in jeopardy the privacy interests of every citizen who does business with a bank and raises serious and unanswered questions for our national security.

The first issue raised by the opinion below is whether 28 U.S.C. Section 1782(a) can by itself vest in a district court jurisdiction to issue a subpoena duces tecum to a bank for records of a depositor:

(a) where the application was not ancillary to any case pending in a court of the United States;

(b) where there was no advance notice of the *ex parte* application or proceeding to the bank or to the depositor at any time before the subpoena was issued;

(c) where neither the bank nor the depositor were named or joined as a party at any time before the subpoena was issued;

(d) where the objections interposed by the depositor after the issuance of the subpoena evidenced no underlying dispute "arising under" any federal statute or treaty; and

(e) where the *ex porte* application alleged no diversity of citizenship and involved no diversity of citizenship.

Article III, Section 2, of the Constitution limits the judiciary to:

> ... actual controversies arising between adverse litigants. ...

Muskrat v. United States, 219 U.S. 346, 361 (1911) and to:

> ... questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. ...

Flast v. Cohen, 392 U.S. 83, 95 (1968), and only to cases and controversies arising under the Constitution, treaties or laws of the United States, etc.

Sub judice, the district court ordered bank records disclosed to the government of Trinidad and Tobago despite the fact that no case is pending before any court of the United States. Indeed, no Article III basis for jurisdiction is present at all. The United States is not a party to any such dispute before the District Court nor is the Court presented with any dispute involving a citizen of any state and citizens of any other state, a state itself, or a foreign state. Moreover, since notice is not required by the terms of Section 1782 or by the decision of the Eleventh Circuit, it was merely fortuitous that Azar happened post-subpoena to interject his objections.

This Court has repeatedly recognized that persons cannot avail themselves of federal procedural rules in the absence of antecedent Article III jurisdiction. Fundamentally, this distinguishes those instances where the jurisdiction of the federal courts was properly invoked from situations like the one at bar where no basis for jurisdiction exists.

In *Aetna Life Insurance Co. of Hartford Connecticut v. Haworth*, 300 U.S. 227, 238-230 (1937) a declaratory judgment action was found to be an Article III case or controversy by virtue of the diversity of citizenship of the parties; the mere fact that the case arose under the procedures of the federal Declaratory Judgment Act did not render the controversy a "federal question" — "It is the nature of the controversy, not the method of its presentation . . . that is determinative." *Id.*, 300 U.S. at 465; *See also, State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532, 535 (9th Cir. 1969). Applying that rule of law to the case at bar the "nature" of the dispute did not constitute a federal question and therefore did not "arise" under any law of the United States; nor did the "method of presentation" of that dispute via a Section 1782 application alter its non-federal question nature.[1]

These distinctions are well illustrated by *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), *United States v. Nixon*, 418 U.S. 683 (1974) and *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980). In *Brimson* and *Nixon*, the nature of the controversies concerned refusals to honor previously issued subpoenas that gave rise to the suits. In *Brimson*, the subpoena was issued under the Commerce powers and the nature of the pre-litigation dispute was therefore under the Constitution of the United States; in *Nixon*, the pre-litigation dispute concerned a claim of privilege under Article II of the Constitution. In *GTE*, the pre-litigation dispute was under the Federal Freedom of Information Act. Moreover, all three of these cases were adversary proceedings with parties plaintiff and defendant.

---

1. Even where a deposition is sought to be taken under Fed.R.Civ.P. 27(a) to perpetuate testimony in advance of an action, that Federal Rule requires that the person seeking to perpetuate the evidence show that the to-be-filed action is one "cognizable in a court of the United States," a fact not demonstrated in the case at bar.

These distinctions are further illustrated by *Eichel v. United States, Fidelity & Guaranty Co.*, 245 U.S. 102 (1917). Initially, plaintiff Eichel sued the guarantee company at law in federal court on cases "arising under a law of the United States." The guaranty company then "exhibited in that court a bill" seeking discovery of matters relevant to its defense of the actions at law. This Court held that jurisdiction was vested to entertain the bill because it was "ancillary" to the federal-question actions at law. By contrast, in the case at bar, the Section 1782 application for the subpoena is not "ancillary" to any other suit pending in the federal courts.

Even without reference to these dispositive considerations, the Ninth Circuit has held an *"ex parte"* application not to be an Article III "case" in part because:

> . . . there was no adverse party to the proceeding. There was an opportunity to file protests, but of what nature we are not advised by the statute. All this savors again of an administrative proceeding.

Application of L. B. & W. 4217, 238 F.2d 163, 166 (9th Cir. 1956). Section 1782 likewise incorporates no mechanism for either notice to or objection by interested persons before issuance of the subpoena. See also *Matter of Baker*, 693 F.2d 925 (9th Cir. 1982) (*ex parte* application for a court-appointed attorney for a fee award under 18 U.S.C. Section 3006A is merely "administrative" incident to operation of judiciary and not a "case" or "controversy"). Indeed, this Court has held that "it is elemental that there must be parties before there is a case or controversy." *Ellis v. Love*, 421 U.S. 426, 434 (1975); but the instant *ex parte* Section 1782 proceeding commenced with only one party.

There is yet another reason why this Section 1782 application is not an Article III "case"; *Flast v. Cohen* held that the "case or controversy" clause must be interpreted to:

> . . . assure that the federal courts will not intrude into areas committed to the other branches of government.

392 U.S. at 95.

The Court of Appeals' interpretation of Section 1782 thrusts upon the federal court a role to which it is particularly unsuited, i.e. the making of foreign policy. According to the lower court, Section 1782 requires a district court "to exercise its discretion" in granting judicial assistance to foreign countries by "tak[ing] into account the nature and attitudes of the country from which the request emanates and the character of the proceedings in that country.' 1964 U.S. Code Cong. & Admin. News at 3788." (App. 6a, n. 8). But no court can exercise such discretion without intruding upon matters and policies which are properly within the domain of the Department of State.

Consider the government of Haiti. Before the departure of former President-for-Life Jean-Claude Duvalier, an *ex parte* application for bank records from an official of Haiti would have required a District Court to consider whether granting the request would endanger the lives of persons opposed to the Duvalier regime. After his departure, the same concern would apply to the supporters of Duvalier. Since the recent coup, it would be impossible for the court to determine who might be at risk. *But see, In re Letter of Request for Judicial Assistance from the Tribunal Civil De Port-au-Prince, Republic of Haiti,* 669 F.Supp. 403, 406 (S.D. Fla. 1987)(granting request for subpoena for bank records despite finding evidence in record that proceedings in Haiti "lack certain procedural protections over the rights of the accused")

There are numerous nations around the world where the rights of individuals are not respected. And some of those nations are friendly with our government. Fundamentally, if a court of the United States would refuse to honor a

request from a country supported by our government, that court may well be making foreign policy at odds with the executive.

The shortsightedness of the lower court's position herein is demonstrated by considering who in the United States is likely to be the subject of a foreign government's interest. Assume that in the course of an investigation by a foreign government's internal security an officer came across a bank account in the United States. That official might apply to a United States District Court *ex parte* for a subpoena for the records of that account. Those records might reveal the identities of persons who had made contributions to an opposition party, the identities of those who received that money, even the identities of persons in the United States to be targeted for assassination. If the account was maintained by the FBI or the CIA, the persons targeted for assassination might be our own agents and banking transactions involving national security interests might be compromised. But the court will not know any of this because the foreign government will disguise the request as a legitimate inquiry.

Foreign governments and their citizens will vie to avail themselves of the procedures approved of by the Eleventh Circuit; and it is reasonable to expect that *ex parte* proceedings like the one at bar will become commonplace. Indeed, in the context of letters rogatory *ex parte* proceedings have already been said to be commonplace. See e.g. *In re Letters Rogatory from the Tokyo District, Tokyo, Japan,* 539 F.2d 1216, 1219 (9th Cir. 1976)("Letters rogatory are customarily received and appropriate action taken with respect thereto *ex parte*"). Fundamentally Section 1782 has no mechanism for assuring that our courts are not used for an improper purpose. Our courts have neither the expertise nor the resources to determine for themselves if they are being used for an improper purpose particularly where no proceeding is pending anywhere in the world.

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. SECTION 1782 AFFORDS FOREIGN PERSONS AND GOVERNMENTS DISCOVERY PROCEDURES MORE ADVANTAGEOUS THAN THOSE AVAILABLE TO CITIZENS OF THE UNITED STATES, THREATENS TO INUNDATE OUR COURTS WITH REQUESTS FOR PRE-LITIGATION DISCOVERY, AND UNDERMINES THE RIGHT TO PRIVACY ESTABLISHED BY CONGRESS IN THE RIGHT TO FINANCIAL PRIVACY ACT.

These dispositive jurisdictional arguments aside, it is inconceivable that Congress would have intended for foreign governments and persons to have access (especially in this *ex parte* context) under Section 1782 to bank records in the absence of a pending proceeding somewhere in the world. A citizen of the United States does not have the right to request a district court to subpoena someone else's bank records in anticipation of litigation. Except in those situations where testimony is sought to be perpetuated "before action" [with the procedural safeguards of advance notice to prospective adverse parties, Fed.R.Civ.P 27(a)], discovery in federal court is limited to pending actions, Fed.R.Civ.P. 26(b)(1). A United States citizen's right to discovery attaches only after a suit has been filed.

In placing foreign persons at an advantage over citizens in the United States, the decision below ran afoul of the decision of this Court in *Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourism v. United States District Court for the Southern District of Iowa*, 482 U.S. ___, 107 S.Ct. 2542 (1987). In that case, this Court held that discovery procedures available under the

Hague Convention[2] were not exclusive and did not prevent litigants from utilizing other discovery procedures available under the Federal Rules of Civil Procedure. In so holding this Court noted that a contrary rule would put foreign companies at a competitive advantage over domestic concerns because foreign companies could seek access to information in the United States which domestic companies would be prohibited from seeking. *Id.* at 2553 n. 25.

Surely Congress did not contemplate, much less intend such a result. The purpose of the 1964 amendments to Section 1782 was to assist bodies of a quasi-judicial or administrative nature and foreign investigative magistrates, particularly magistrates from civil-law nations, in obtaining material for use in proceedings before such bodies. (App. 5a). But pre-litigation discovery is unheard of in civil-law countries. *Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourism v. United States District Court for the Southern District of Iowa,* 107 S.Ct. at 2565-66 n. 21 (Blackmun J. dissenting). Thus, not only does the decision below give to foreign persons and governments greater powers of discovery than is available to citizens of the United States, it also gives foreign persons greater powers of discovery than is available in their own country. No reason in law or policy justifies such a result.[3]

---

2. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, TIAS No. 7444.

3. The lower court felt compelled by rules of statutory construction to conclude that Congress did not intend to limit the use of Section 1782 to situations where a proceeding was pending. The 1964 amendments to Section 1782 were a complete revision of the prior law. The earlier statute read:

> The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a

(footnote continued on next page)

It is equally absurd to believe that Congress would have wanted to undermine the protections afforded by the Right to Financial Privacy Act, 12 U.S.C. Sections 3402-03. That Act prohibits any agency or department of the United States from obtaining financial records from a financial institution, and prohibits financial institutions from providing them to the government, unless access is accomplished by one of five methods under procedures mandated in the Act.[4]

(footnote continued from preceding page)

person authorized to administer oaths designated by the district court where the witness resides or may be found. . . .

Act of June 25, 1948, ch. 646, Section 1782, 62 Stat. 949. Among other changes, Congress replaced the requirement that the assistance must be for use in "any judicial proceeding pending in any court in a foreign country" with the requirement that the assistance be used "in a proceeding in a foreign or international tribunal." According to the lower court, "When the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute." (App. 8a). The flaw in the court's analysis is that Congress did not merely amend the prior law, it totally replaced it. In such circumstances it is just as reasonable to conclude that Congress thought the word "pending" would have been redundant if used before the word "proceeding" in the new law. Moreover, because the legislative history is silent as to this question, the courts "must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." *Cass v. United States*, 417 U.S. 72, 83 (1974). Indeed, this Court has noted that, "a change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature." *Stewart v. Kahn*, 20 U.S (11 Wall) 493, 502 (1871). In the case at bar the lower court found support for its interpretation in a law review article written by the reporter for the commission which proposed the amendments to Congress. Smit, *International Litigation Under the United States Code*, 65 Colum.L.Rev. 1015, 1027 (1965). Smit's article, however, was written *after* the amendments were enacted and cites to nothing in the legislative history to support his *post factum* opinions. Thus this article sheds absolutely no light on what Congress may have intended.

4. These include: (1) customer authorization; (2) administrative summons or subpoena; (3) search warrant; (4) judicial subpoena; or (5) formal written request. Under the Act the only entity permitted access to bank

(footnote continued on next page)

This Act was created with the intent of protecting the customers of financial institutions "from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." 1978 U.S. Code Cong. & Admin. News at 9305.

The problems inherent in disclosing detailed financial information to third persons for use in judicial proceedings in the United States are magnified when such information is disclosed for use in a foreign jurisdiction. In the United States, bank customers are protected from improper discovery of financial information as a result of our judicial system's notions of due process and fundamental fairness. Fairness fundamentals include notice, the right to present evidence, the right to be represented by counsel, and the right to confront witnesses. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 294-95 (1973). United States bank customers are also protected from improper dissemination of financial information, once disclosed, through the use of protective orders, enforced through the imposition of sanctions. *See* Fed.R.Civ.P. 26 and 37. For example, protective orders can be used to limit the discovery of financial information to the relevant issues in the case, and to limit the persons who have access to any financial information disclosed. It cannot be assumed that foreign governments satisfy these due process and fundamental fairness standards mandatory in domestic judicial proceedings. Once financial information has been disclosed to a foreign government or its nationals, it is no longer within our court's control.

The lower court's decision cedes to foreign governments and their nationals a facile procedural device for *ex parte* intrusion into the financial records of United States

---

(footnote continued from preceding page)
records without notice to the depositor is the United States government, and then only with the approval of the court. 12 U.S.C. Section 3409.

citizens[5] as long as that foreign government or national represents in the *ex parte* request for judicial assistance that "the evidence sought will eventually be used in a proceeding in a foreign or international tribunal." Such an interpretation of Section 1782 encourages international *ex parte* prelitigation fishing expeditions and renders the Right to Financial Privacy Act, enacted twelve years subsequent to Section 1782, virtually meaningless.

Petitioner argued to the court below that many of these concerns would be resolved if Section 1782 were limited to instances where a proceeding were actually pending before a foreign tribunal. In rejecting this suggestion, the lower court failed to address how, absent a requirement that proceedings be pending, a court could determine (especially *ex parte*) that the information sought was not intended for an improper purpose.[6]

By permitting a foreign government to obtain bank records non-adversarially in the absence of a pending proceeding anywhere in the world and by doing so without notice to persons whose identities might be revealed by these

---

5. It also gives access to bank records of residents of foreign nations living in the United States, resident aliens, and political refugees.

6. Even in those circumstances where the owner of the records fortuitously learns of the subpoena, the real target of the subpoena may be someone else. Thus, without a pending proceeding anywhere, a district court will never know if the real party in interest is the account holder or a person whose identity will be revealed by an examination of the account holder's records. We recognize that in the context of a grand jury subpoena, persons whose identities are incidentally revealed by the production of documents are generally not given notice of the disclosure. However, in that circumstance we have some confidence that these third parties are not going to be persecuted by our government. Similarly, where information is sought pursuant to the Freedom of Information Act, the agencies involved determine whether persons identified by the documents have a privacy or security interest requiring redaction of the documents. 5 U.S.C. Section 552(b). Finally, where documents are released in the course of civil litigation, the likelihood of abuse is minimal.

records, the Act makes our courts party to events over which they have absolutely no control. Our courts are ill equipped to judge (especially *ex parte*) whether a disclosure to a foreign government will be used for a legitimate or an illegitimate purpose. Where there is a proceeding pending in a foreign tribunal our courts have some degree of confidence that the information is being sought for a proper purpose and the proceedings themselves provide our courts with a way to verify that the records are being used properly.

It is axiomatic that a court must not interpret an Act so as to lead to absurd results. *United States v. Mendoza,* 565 F.2d 1285, 1288 (5th Cir. 1978). The Eleventh Circuit's interpretation of Section 1782 does just that.

CONCLUSION

Only in compliance with Article III jurisdictional requirements can Section 1782 procedures be an incentive to cooperation among the nations without offending our Constitution, undermining the right of privacy that we in the United States enjoy, and without giving to foreign powers rights which our citizens do not possess. We submit, therefore, that the decision of the Eleventh Circuit is in error,

that the decision is one of great public importance, and that as a consequence the decision should be reviewed by this Court.

Respectfully submitted.

JON MAY
Counsel of Record
JEFFREY H. KAY
Counsel for Petitioner
ARTHUR J. MORBURGER
Of Counsel

September 1988

Appendix

In re REQUEST FOR ASSISTANCE FROM MINISTRY OF LEGAL AFFAIRS OF TRINIDAD AND TOBAGO

Petition of Joseph AZAR

No. 86-6011

United States Court of Appeals,
Eleventh Circuit.

July 7, 1988.

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

FAY, Circuit Judge:

Joseph Azar challenges the district court's refusal to quash a subpoena that it had directed at Azar's bank, the Union Bank of Florida. The district court issued the subpoena pursuant to 28 U.S.C. § 1782(a) (1982)[1], in response to a request by the Attorney General and Minister of Legal

---

* Honorable Walter E. Hoffman, Senior U.S. District Judge Eastern District of Virginia, sitting by designation.

1. Section 1782(a) reads as follows:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing *for use in a proceeding* in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or upon the application of any interested person* and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court....
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. (emphasis added).

Affairs in Trinidad and Tobago ("Minister of Legal Affairs"). This appeal presents an issue of first impression — whether section 1782 requires that a proceeding be pending before a federal court may grant judicial assistance to a foreign official. We hold that 28 U.S.C. § 1782 does not impose such a requirement and affirm.

I. BACKGROUND

On December 31, 1985, the Minister of Legal Affairs of Trinidad and Tobago asked the United States Attorney General to help obtain authenticated copies of the bank records of Joseph Azar. The Minister of Legal Affairs sought the records in connection with a criminal investigation of Trinidad and Tobago nationals involved in violations of the Exchange Control Act. *See* Ch. 79:50 Laws of Trinidad and Tobago. The Department of Justice moved the district court to issue a subpoena for the records under Section 1782. On July 11, 1986, the district court granted the *ex parte* request for a subpoena of the bank records. Azar immediately sought to quash the subpoena on the grounds that section 1782 requires that a proceeding be pending in the foreign country. After carefully scrutinizing the request, the district court denied the motion to quash. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* 648 F.Supp. 464 (S.D.Fla.1986). This appeal followed.

II. HISTORY

To aid us in resolving the issues presented by this case, we must first consider the history of section 1782. The Act of March 2, 1855 first authorized federal courts to assist foreign tribunals.[2]

This statute granted federal courts the power to compel the testimony of witnesses in order to assist foreign courts. *In re Letter Rogatory from the Justice Court, District of Montreal, Canada,* 523 F.2d 562, 564 (6th Cir. 1975). The passage of the Act of March 3, 1863, however, soon restricted this first statute.[3] The 1863 Act allowed the United States courts to obtain testimony to assist foreign courts only if

---

2. Section 2 of the Act reads:

> And be it further enacted, That where letters rogatory shall have be [sic] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.

3. Section 1 of this Act states:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a

(footnote continued on next page)

such testimony was for use in suits (1) which pertained to the recovery of money or property, (2) which were pending in a foreign country with which the United States was at peace, and (3) in which the government of the foreign country was a party or had an interest. This 1863 statute, with its limitations, remained relatively unchanged until 1948.

Beginning in 1948, Congress enacted several amendments that broadened the scope of the statute. The 1948 amendment deleted the requirement that the foreign government be a party or have an interest in the suit.[4] Congress also changed the limitation that the "suit [be] for the recovery of money or property" and eventually only required that the action be a "judicial proceeding." *See* Act of May 24, 1949, ch 139, § 93, 63 Stat. 103. During this time, however, Congress retained the requirement that the judicial proceeding be pending in a foreign country with which the United States was at peace.

In 1964, Congress enacted the most recent amendments to section 1782. These modifications marked a significant departure from Congress' cautious approach to international judicial assistance. *Letter Rogatory from*

(footnote continued from preceding page)

> summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. . . .

Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769-70.

4. The applicable section of the 1948 Act declares:

> The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. . . .

Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949.

Montreal, Canada, 523 F.2d at 565. Congress adopted, without objection, a set of proposals submitted by the Commission on International Rules of Judicial Procedure which revised section 1782.[5] The legislative history shows that the purpose behind the proposals was to encourage other nations to follow the lead of the United States and to adjust their procedures in order to improve practices of international cooperation in litigation.[6]

These amendments broadened section 1782's ability to provide assistance in several ways. First, while the previous incarnations of section 1782 only allowed a district court to assist in the taking of depositions and testimony, the 1964 changes enabled federal courts to assist in obtaining documents and other tangible evidence. Second, to permit district courts to assist in proceedings before foreign investigating magistrates and administrative decision makers, Congress only required that the evidence be for use in a "foreign tribunal" rather than for use in a "court."[7] Third,

---

5. S.Rep. No. 1580, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S.Code Cong. & Admin.News 3782 [hereinafter 1964 U.S.Code Cong. & Admin.News]; Smit, *International Litigation Under the United States Code,* 65 Colum.L.Rev. 1015, 1017 (1965). Congress had created the Commission to study and evaluate those provisions of the federal code that related to international judicial assistance. The Commission's goal was to revise the law to provide "[w]ide judicial assistance... on a wholly unilateral basis." *Letter Rogatory from Montreal, Canada,* 523 F.2d at 565 (quoting Amram, *New Developments in International Judicial Assistance in the United States of America,* 32 J.B. Ass'n of D.C. 24, 28 (1965)).

6. *See* Letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure, to John McCormack, Speaker of the House, (May 28, 1963), *reprinted in* 1964 U.S. Code Cong. & Admin.News at 3792-94.

7. The legislative history explains why Congress switched from the word "court" to "tribunal."

> A rather large number of requests for assistance emanate from investigating magistrates. The word "tribunal" is used to make it

(footnote continued on next page)

the 1964 amendment allowed, for the first time, an "interested person" as well as a foreign tribunal to request judicial assistance. The legislative history stated that an "interested person" can be a "person designated by or under a foreign law, or a party to the foreign or international litigation." 1964 U.S.Code Cong. & Admin.News at 3789. Hans Smit, the reporter to the Commission that drafted the proposals which Congress adopted, stated that the term "interested person" included foreign officials as well as actual litigants. Smit, *supra* note 6, at 1027. Finally, Congress replaced the requirement that the assistance must be for use in "any judicial proceeding *pending* in any court in a foreign country" with the requirement that the assistance be used "in a proceeding in a foreign or international tribunal." This change dropped the word "pending" from the statute.[8]

(footnote continued from preceding page)

> clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.

1964 U.S.Code Cong. & Admin.News at 3788 (citations omitted).

8. The 1964 amendments also eliminated the requirement that the assistance be rendered to a court in a "foreign country with which the United States is at peace." The legislative history states that, if the United States is at war, the peace requirement is unnecessary since the Trading With the Enemy Act, 50 U.S.C.App. §§ 1-44 (1982), would forbid any assistance to the enemy. 1964 U.S.Code Cong. & Admin.News at 3789. The legislative history also suggests that if relations are strained between the United States and the foreign country then the district court is to exercise its discretion by "tak[ing] into account the nature and attitudes of the country from

(footnote continued on next page)

In sum, the history of section 1782 reflects a congressional desire to increase the power of district courts to respond to requests for international assistance. *In re Letters Rogatory from the Tokyo District, Tokyo, Japan,* 539 F.2d 1216, 1218 (9th Cir.1976). The purpose of the 1964 amendments was to broaden prior law and permit federal courts to assist bodies of a quasi-judicial or administrative nature and foreign investigating magistrates. Through these amendments, Congress reaffirmed the inherent authority of th United States courts to grant international judicial assistance. *See* 1964 U.S.Code Cong. & Admin.News at 3785. By taking the initiative in foreign cooperation, Congress also attempted to stimulate reciprocity. *John Deere Ltd. v. Sperry Corp.,* 754 F.2d 132, 135 (3rd Cir.1985). Finally, Congress left the district court with the discretion to decide whether to honor requests for assistance. *Letters Rogatory from Tokyo, Japan,* 539 F.2d at 1219.

III. ANALYSIS

Since Congress has given the district courts broad discretion in granting judicial assistance to foreign countries, we may overturn a district court's grant of such assistance only if it is an abuse of discretion. *See In Re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea,* 555 F.2d 720, 724 (9th Cir.1977); *see also United States v. Silverman,* 745 F.2d 1386, 1397 (11th Cir. 1984) (district court must have abused its discretion to reverse an order sustaining a subpoena). Azar's principal contention is that section 1782 removes the district court's discretion to grant Trinidad and Tobago's Minister of Legal Affairs any assistance because section 1782 still requires

---

(footnote continued from preceding page)
which the request emanates and the character of the proceedings in that country." 1964 U.S.Code Cong. & Admin.News at 3788.

that a proceeding currently be pending. Azar contends that the legislative history supports his view.

A. *The Pending Requirement*

Azar concedes that the 1964 amendments eliminated the word "pending" and broadened the ability of the district court to grant assistance. When the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute. *United States v. Canadian Vinyl Industries,* 555 F.2d 806, 810, 64 CCPA 97 (1977); 1A Singer, *Sutherland Statutory Construction,* § 22.01 (4th Ed.1984). Indeed, when words of plain meaning are excised, the deletion of such language "almost compels the opposite result." *Chertkof v. United States,* 676 F.2d 984, 987 (4th Cir.1982). We believe that Congress' elimination of the word "pending" almost compels us to conclude the "opposite result"—that a pending proceeding is not absolutely necessary. We will not treat Congress' deletion of the word "pending" as a mistake or mere accident. Our belief is supported by Hans Smit who wrote, "It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually used in such a proceeding." Smit, *supra* note 6, at 1027.

The result of one Ninth Circuit case indicates that a pending proceeding is not always necessary to a grant of assistance. In *Letters Rogatory from Tokyo, Japan,* 539 F.2d 1216, the Tokyo District Prosecutor's Office asked the Tokyo District Court to request the assistance of a United States court in obtaining depositions for use "in criminal investigations and *possible future* criminal trials in Japan." *Id.* at 1217 (emphasis added). The Ninth Circuit overlooked the lack of any pending criminal proceeding and decided that, since the request was not " 'unrelated' to 'judicial or quasi-judicial controversies,' " it had to affirm the federal district court's grant of assistance. *Id.* at 1219. This decision

demonstrates that the determination to grant assistance turns not on whether the proceeding is pending but on whether the requested evidence will likely be of use in a judicial proceeding.

Azar, however, points to the use of the term "litigant" in the legislative history to argue that Congress only meant to provide assistance to an "interested person" who is presently involved in a pending proceeding. *See* 1964 U.S.Code Cong. & Admin.News at 3788. This reliance is misplaced. First, the only requirement specifically mentioned in the legislative history is that the assistance must be "in connection with" a proceeding. *Id.* Second, we believe that Congress did not use the word "litigant" to encompass all types of "interested persons," but used the word as a common example of an "interested person." An "interested person," as stated earlier, can also be a foreign official. While a private individual may need to be a litigant in a pending proceeding in order to be an "interested person," a foreign official properly designated under foreign law may fall within the definition of "interested person" even when a proceeding is not pending at the time of the request. Therefore, the word "litigant" in the legislative history does not restrict a request for assistance from a foreign official to "pending" proceedings.[9]

B. *Abuse of Discretion*

In this case it is clear that the district court did not abuse its discretion. First, the district court properly concluded that the Minister of Legal Affairs was an interested

---

9. A request for assistance from an international tribunal will normally occur only when the tribunal is considering a proceeding before it. Consequently, when discussing requests emanating from international tribunals, the legislative history uses the phrases "pending before investigating magistrates" and "proceedings before" administrative tribunals. 1964 U.S.Code Cong. & Admin.News at 3788 (quoted *supra* note 8). These phrases do not indicate, however, that a proceeding must be pending in order for a district court to grant a request for assistance from an "interested person" such as a foreign official.

person as contemplated by the statute. Under the law of Trinidad and Tobago, the Minister of Legal Affairs is legally responsible for the enforcement of the Exchange Control Laws. Because he has this legal responsibility, the Minister of Legal Affairs is an "interested person" under section 1782.[10]

Second, the evidence is "for use in a proceeding" as required by section 1782. When the Minister of Legal Affairs requested the assistance, he set forth the documents he desired, the information he expected to find, and the reason he would use the documents in the eventual proceeding. The district court noted that the Minister of Legal Affairs had requested the production of the documents in a particular form to ensure their admissability in the future criminal proceeding. Also, the Minister of Legal Affairs had offered to pay certain bank personnel to travel to Trinidad and Tobago and testify concerning the authenticity of the records. All of this suggests that a proceeding is imminent. On the other hand, Azar has provided no evidence suggesting that the Minister of Legal Affairs is seeking the records for some reason other than "for use in a proceeding." Therefore, the district court could reasonably conclude that the records would be used in a criminal trial.

---

10. This court recognizes that there are several cases which would tend to indicate that the Minister of Legal Affairs is not classified as a "foreign tribunal" under section 1782. *See Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir.1980) (per curiam) (Superintendent of Exchange Control of Columbia); *In re Letters Rogatory Issued by the Director of Inspection of the Government of India,* 385 F.2d 1017 (2d Cir.1967) (Indian Income Tax Officer); *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada,* 59 F.R.D. 625 (N.D.Calif.) (special Manitoba, Canada Commission of Inquiry), *aff'd,* 488 F.2d 511 (9th Cir.1973). That the Minister of Legal Affairs lacks adjudicatory powers and is not a tribunal, however, has no bearing on his status as an "interested person."

Finally, the records sought are discoverable under the laws of Trinidad and Tobago. While a district court generally should not decide whether the requested evidence will be admissible in the foreign court, *see John Deere*, 754 F.2d at 136, the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance. *See id.; In re Court of the Commissioner of Patents for the Republic of South Africa*, 88 F.R.D. 75, 77 (E.D.Pa.1980). In this case, the Central Bank of Trinidad and Tobago has the authority to request the bank records of any customer's account when it suspects violations of the Exchange Control Laws.[11] The Minister of Legal Affairs works closely with the Central Bank and could have obtained the records through the Central Bank if Azar's bank was within the Central Bank's jurisdiction. Azar has not indicated any privilege recognized under Trinidad and Tobago laws that would forbid the discovery of his bank records.[12]

IV. CONCLUSION

Congress has given the district courts a great responsibility to determine whether to grant judicial assistance in foreign litigation. To prevent abuse, the district judge should carefully examine and give thoughtful deliberation to any request for assistance submitted by an "interested person" before a judicial proceeding has begun. The district judge should satisfy himself that a proceeding is very likely to occur. If the judge doubts that a proceeding is forthcoming, or suspects that the request is a "fishing expedition" or a vehicle for harassment, the district court should deny the

---

11. *See* Exchange Control Act of Trinidad and Tobago, Fourth Schedule, Part I, § 1 and Part V, § 39.

12. The release of the bank records also will not violate any United States law or privilege. The records will be released in conformance with the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22 (1982).

request. In this case the district court concluded that a proceeding was probable and properly assisted the Minister of Legal Affairs by ordering the production of the bank records.

AFFIRMED.

In re REQUEST FOR ASSISTANCE FROM MINISTRY OF LEGAL AFFAIRS OF TRINIDAD AND TOBAGO

Memorandum Decision

United States District Court
Southern District of Florida
Case No.: 86-1461-Civ-Scott

Filed December 8, 1986

BACKGROUND

Joseph Azar moves to quash a subpoena issued by the District Court of the Southern District of Florida commanding the Union Bank of Florida to produce certain records concerning Joseph Azar's bank account. The order authorizing the subpoena was issued in response to a Request for Judicial Assistance by the Attorney General and Minister of Legal Affairs of Trinidad and Tobago pursuant to 28 U.S.C. § 1782.

The Attorney General and Minister of Legal Affairs of Trinidad and Tobago issued the Request for Judicial Assistance in aid of an ongoing criminal investigation by the Director of Public Prosecutions of Trinidad and Tobago and the Trinidad and Tobago Police Service. The investigation concerns alleged violations of the Exchange Control Act of Trinidad and Tobago by one named, unindicted individual and other unnamed, unindicted individuals. The information sought is for use in a judicial proceeding to be held in Trinidad.

Azar moves to quash the subpoena on the grounds that the Attorney General and Minister of Legal Affairs of Trinidad and Tobago is not a "tribunal" within the meaning of

§ 1782.[1] He asserts, in essence, that a district court's discretion to appoint a commissioner and authorize the issuance of a subpoena under § 1782 is limited to those instances where the requesting party is a "tribunal." Counsel for the Government argues that the controlling issue is whether the testimony, statement or document is requested by an interested person within the meaning of § 1782 and is "for use in a proceeding in a foreign or international tribunal." This court determines that government counsel posits the dispositive issue[2] and notes that the issue is one of first impression in this Circuit.

LEGAL DISCUSSION

Section 1782(a) provides in pertinent part that:

> The District Court of the district in which a person resides or is found may order him to give his testimony or statement or to provide a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given or the document or other thing be produced, before a person appointed by the court. . . . (Emphasis added).

---

1. Azar also contends that his rights under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, have been violated. This contention is meritless. *The only record subpoenaed from Union Bank to date was a request for the name* and last known address associated with a designated account number. A request for such information pursuant to a judicial subpoena is specifically excluded from the provisions of the Right to Financial Privacy Act. *See* 23 U.S.C. § 3413(g).

2. To the extent that *Fonseca v. Blumenthal*, 620 F.2d 322 (2nd Cir.1980), holds otherwise, this Court respectfully disagrees.

Only two restrictions are explicitly stated under the statute: (1) the request must be made either through a letter rogatory or by a foreign or international tribunal or by an interested person; and (2) the evidence sought must be for use in a proceeding in a foreign or international tribunal. Each will be discussed within the context of the instant case.

1. *Request By An "Interested Person"*

Contrary to Azar's assertions, there is no requirement that the request for assistance be made by a tribunal or be in the form of a letter rogatory. An application may be made by any interested person. The legislative history supports this view:

> A request for judicial assistance under the proposed revision may either be contained in a letter rogatory or other request or be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation. Subsection (a) specifically so provides.

(1964 U.S. Code Cong. and Admin. News p.3789.)

In the case *sub judice,* this Court determines that the request for assistance was made by an "interested person" within the meaning of § 1782. In making this determination, the Court is guided by the interpretation given the term "interested person" by Hans Smit, the Reporter to the Commission and Advisory Committee on International Rules of Civil Procedure. As interpreted by Smit,

> the [term "interested person"] is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance.

Smit, *International Litigation Under the United States Code,* 65 Colum. L. Rev. 1015, 1027 (1965).

The Attorney General and Minister of Legal Affairs of the Republic of Trinidad and Tobago is a foreign official who possesses a reasonable interest in obtaining assistance. He is seeking production of certain documents in order to assist an ongoing criminal investigation concerning violations of the Exchange Control Act of Trinidad and Tobago by certain individuals. His Request makes absolutely clear that the purpose of the documents requested is for use at trial. As stated in his Request,

> [the Ministry of Justice of the Republic of Trinidad and Tobago] needs copies of the records of the accounts of the aforementioned Banks to show that the proceeds of the currency control regulation scheme were actually transferred and in order to show the ultimate beneficiaries of the scheme. The records are also required to show the size and magnitude of the sums involved in the scheme in question. These records are evidence needed for use in a judicial proceeding to be held in Trinidad. Request, p.5.

In addition, the procedures which the Attorney General and Minister of Trinidad and Tobago requests be followed in the production of the documents indicates that the documents are desired in a form in which they will be admissable as evidence. *See,* Request p.6. Furthermore, the Attorney General specifically requests that inquiry be made "of the appropriate Bank officials" to determine whether "he or she would be willing to travel to Trinidad at our expense to testify at trial regarding the authenticity of these records." Request, p.6. These facts unquestionably demonstrate that the Attorney General of Trinidad and Tobago possesses a reasonable interest in obtaining assistance in the

production of the requested documents. He is, thus, an "interested person" within the meaning of § 1782 and thereby meets one of the statute's two requirements.

2. *For Use In A Proceeding in a Foreign Tribunal*

The specific representation of the Attorney General of Trinidad and Tobago that the requested documents are to be used at trial, and the obvious interest in obtaining these records in admissible form, also substantiate beyond question that the documents requested will be "for use in a proceeding in a foreign tribunal" within the meaning of 28 U.S.C. § 1782. Although the judicial proceeding in which the requested documents are to be used is not currently pending, § 1782 imposes no such requirement. Indeed, in contradistinction to its predecessor[3], the 1964 amendment to § 1782 eliminated the word "pending".

The judicial history provides no meaningful indication as to the reason for the elimination of the word "pending". In such circumstances, the congressional intent must be ascertained from the language of the new provision vis-a-vis the old. Examining the two provisions, it is reasonable to assume that the elimination of the word "pending" was intended to facilitate the gathering of evidence prior to the institution of litigation and indicates that it is not necessary for the proceeding to be pending at the time the evidence is sought.[4] *See* Smit, *International Litigation Under The United States Code*, 65 Columb. L. Rev. 1015, 1026 (1965).

---

3. The former version of § 1782, 63 Stat. 103 (1949), required that the deposition of a witness was "to be used in any judicial proceeding pending in any court in a foreign country."

4. This analysis follows the canon of statutory construction that "the legislative language will be interpreted on the assumption . . . that if any change occurs in legislative language, a change was intended in legislative result." Sutherland Statutory Construction, Section 4510, 3rd Edition, Horach.

Thus, the pivotal inquiry this Court must make is whether the evidence sought will eventually be used in a proceeding in a foreign or international tribunal. As previously mentioned, the Request by the Attorney General of Trinidad and Tobago clearly substantiates that the requested documents are to be used at trial. Accordingly, this Court concludes that the Attorney General of Trinidad and Tobago has demonstrated that the requested documents are "for use in a proceeding in a foreign tribunal" within the meaning of § 1782, and he is, therefore, properly seeking the assistance of this Court.

CONCLUSION

Under Section 1782, a district court has the discretion to order the production of a document for use in a foreign or international tribunal upon the application of an interested person. The requirements for exercising this discretion are met in this case. As reasoned above, the Attorney General and Minister of Legal Affairs of Trinidad and Tobago is an interested person who seeks the production of documents for use in a judicial proceeding abroad within the meaning of § 1782.

This result is buttressed by the Congressional intent of enacting the 1964 amendment. Public Law 88-619 was enacted to liberalize and broaden the scope of the authority vested in the United States courts to render assistance to foreign countries.[5] The scope of this authority encompasses

---

5. Support for this interpretation is found in the announced purpose of the 1964 amendment adopted by the Judiciary Committees of both houses of Congress. *See,* 1964 U.S. Code Cong. & Admin.News p. 3783; Judicial Procedures in Litigation with International Aspects, Report of the Committee on the Judiciary, H.R. Rep. No. 1052, 88th Cong., 1st Sess. 4 (1963); S. Rep. No. 1580, 88th Cong., 2d Sess. 2 (1964); *cf.* 1964 U.S. Code Cong. & Admin.News pp. 3782, 3783.

assisting foreign countries in gathering of evidence prior to the institution of litigation.

Based on all the foregoing facts and reasons, it is ORDERED and ADJUDGED as follows:

1. The motion to quash the subpoena is *denied.*

2. This case presents a novel and important issue which this Circuit has not yet addressed. It is hoped that the movant will seek review of this decision to the Eleventh Circuit Court of Appeal. In keeping with this observation, this order will be stayed for twenty (20) days in order to permit Azar to effectuate his appellate rights or to announce his intention not to do so.

DONE and ORDERED, in Chambers, at Miami, Dade County, Florida, this 2nd day of December, 1986.

/s/ Thomas E. Scott

THOMAS E. SCOTT

UNITED STATES DISTRICT JUDGE

Copies mailed to
Counsel of Record

In re REQUEST FOR ASSISTANCE FROM MINISTRY OF LEGAL AFFAIRS OF TRINIDAD AND TOBAGO

Memorandum Opinion (II)

United States District Court
Southern District of Florida
Case No.: 86-1461-Civ-Scott

Filed September 29, 1987

I. INTRODUCTION.

The motion for Relief from Judgment herein presents a second opportunity in this litigation for the Court to consider the legality of a request by Trinidad and Tobago for the production of bank records of Joseph Azar. On the prior occasion, the Court honored the request for assistance pursuant to 28 U.S.C. § 1782, and denied Azar's motion for a protective order. *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago,* 648 F. Supp. 464 (S.D. Fla. 1986).[1] In this motion, however, Azar raises an issue not previously considered by the Court. He now contends that because the domestic laws of Trinidad and Tobago would not permit production of such bank records, his records should not be subject to production by a United States bank under a § 1782 request.

Initially the government objects, arguing that this contention is procedurally barred due to Azar's failure to raise the issue in the initial proceeding. *See Crutcher v. Aetna Life Ins. Policy,* 746 F.2d 1076, 1083 (5th Cir.1984); *United*

1. The initial decision is presently pending on appeal. The Court of Appeal temporarily relinquished jurisdiction to permit this Court to hear the instant motion.

States v. O'Neill, 709 F.2d 361, 373 (5th Cir.1983). While the government's position may be well-founded legally, the importance and novelty of this litigation, as previously noted by the Court, mandate that the substantive issue be fully addressed in order to furnish a complete record to the reviewing tribunal. For this reason, both parties were permitted to offer testimony and documentation on the acceptable procedures and practices under Trinidad and Tobago law. Notwithstanding the presentation and receipt of the evidence, the Court remains convinced that the legislative purpose and intent of 18 U.S.C. § 1782 compel denial of the motion.

II. DISCUSSION

There is no need to detail the history of this litigation as the facts were adequately discussed in the previous opinion. Nor will the Court revisit legal issues previously decided, i.e., (a) whether the Attorney General of Trinidad and Tobago is an interested party within the meaning of 28 U.S.C. § 1782 and, (b) whether there is a requirement of an ongoing proceeding before a tribunal in order to obtain evidence under the statute. The Court will, however, review the purpose and intent of 28 U.S.C. § 1782 in the context of the latest contention of Mr. Azar.

1. *United States Deference*

Azar argues that 28 U.S.C. § 1782 was not designed to be utilized as a discovery device any time the identical evidence could not be obtained under the law of the requesting foreign nation. He contends that at the time of the initial decision on this matter, neither the government nor he was aware of this argument and therefore this Court must consider it now in order to render a judgment that is not "mistaken". *See,* Fed. R. Civ. P. 60(b).

Azar misreads both the intent of the statute and the reasoning behind this Court's earlier decision. As a matter of law and policy, United States courts should refrain from undertaking an extensive analysis of foreign law in determining whether to honor a request for judicial assistance, and should confine its inquiry solely to whether the evidence requested comports with language of 28 U.S.C. § 1782:

> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

The legislative purpose of this statute was to improve and promote international cooperation in litigation. Our courts should not become entangled in interpreting foreign law when deciding whether to grant requests for judicial assistance. So long as the requests do not contravene the laws of the United States, they should be honored. It should be the responsibility of the parties before the foreign tribunal to argue the technical and procedural questions of local law, such as the admissibility of evidence. Foreign tribunals are far more competent to decide issues of their own making than are United States courts. If the situation were reversed, this Court would certainly prefer to interpret United States law rather than have a foreign tribunal sit in judgment.

In short, a policy on international deference encourages reciprocal treatment and is in keeping with the intent of Congress. "Public law 88-619 was enacted to liberalize and broaden the scope of the authority vested in the United States courts to render assistance to foreign countries." *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, supra,* at 467.

2. *Azar's Authority.*

Azar relies solely upon two cases for his proposition. A review of these decisions reveals that neither case supports the movant's claim and, indeed, one opinion rejects Azar's present contention.

In *John Deere Limited v. Sperry Corp.*, 754 F.2d 132, 136 (3rd Cir.1985), the John Deere Company sought an order under 28 U.S.C. § 1782 to require employees of Sperry to appear for deposition and produce documents in connection with a patent infringement suit in Canada. The trial court denied Deere's motion, ruling in part that because Canadian law would not allow the documents and testimony sought to be used at a subsequent trial, production should not be permitted under § 1782. On appeal, the Third Circuit reversed, holding that (a) Congress did not intend the validity of a § 1782 order to depend upon reciprocity[2] and (b) federal courts shall not decide technical questions of foreign law relating to the admissibility of the evidence sought before such tribunals.[3]

In Re Court of Commissions of Patents, 88 F.R.D. 75 (E.D. Pa.1980) involved a request by a civil litigant to obtain testing and documents in connection with patent litigation in South Africa. In rejecting the request, the district

---

2. "Whatever the Canadian law might be with respect to reciprocity, Congress did not intend Section 1782 orders to depend upon recriprocal agreements. Nor should the practice of Canadian courts in refusing to render judicial assistance, be the determining factor in the construction given Section 1782 by an American court." *John Deere Limited, supra* at 135-136.

3. "Although the district court ruled in part that a Section 1782 order should be denied because the evidence sought appeared inadmissible in a Canadian court, we do not believe such a decision was within the province of the district court. Where, in the first instance, the matter sought would be discoverable were all persons within the foreign jurisdiction, the foreign tribunal should decide what use it wishes to allow the elicited documents and testimony." *John Deere Limited, supra* at 136-137.

judge opined that since the requesting party could not show that the evidence sought would be discoverable under South African law, "this Court should not by its exercise of the discretion allowed it under Section 1782 allow litigants to circumvent the restrictions imposed on discovery by foreign tribunals." *Id.* at 77. The district court placed great emphasis, perhaps misplaced, upon the fact that the requesting party was an individual litigant and not a foreign country. While the logic of this decision is clearly in dispute, especially in light of the circuit decision in *John Deere Limited v. Sperry Corp.*, as well as the intent of § 1782, the case is distinguishable for another reason. Here, the requesting party *is* a foreign country which has demonstrated the great significance of the present request not only by asking the United States government to obtain the records for use in a criminal investigation, but also by producing in court its current Director of Public Prosecution, Ms. Glayes Gafour, who testified that the bank records requested would be obtainable under domestic law through the Attorney General and the Central Bank. Therefore, even under the logic of the lower court, the bank records would still be produceable under § 1782 in light of Trinidad and Tobago's well documented position.

This analysis demonstrates that these decisions are of little avail to Azar, and are, in fact, authority for the result that the Court reaches today. As stated by the Third Circuit, "a district court is not to predict the admissibility of discovered evidence in foreign tribunals." *John Deere Limited v. Sperry Corp., supra* at 137.

3. *Dueling Experts.*

The Court conducted two evidentiary hearings over several days. The subject of the hearings was to ascertain whether the laws of Trinidad and Tobago permitted the type of production of bank records sought here. Each party produced a qualified expert who offered an opinion on this

topic. Azar offered Mr. Bruce Procope, a prominent member of the Bar of Trinidad and Tobago, who concluded, in principal, that the records were not obtainable. In contrast, as noted above, the United States government offered Glayes Gafour, an equally distinguished barrister and current Public Prosecutor, who disagreed with Mr. Procope and interpreted Trinidad law to permit production.

In light of the earlier determination that United States courts should not involve themselves in issues of foreign law, the Court need not decide the difficult questions raised by these conflicting expert viewpoints.[4] Indeed, the battle of experts witnessed in this case is compelling evidence for abstention and deference. This issue is better left to a judicial tribunal in Trinidad, which through its expertise and knowledge of domestic law, can more fully explore and decide the complex evidentiary and legal issues presented in this instance. Here, production of Mr. Azar's records will not violate United States law nor does it conflict with our concept of fundamental fairness and due process.[5] Absent such circumstances, this Court will honor the request of Trinidad and Tobago.

III. CONCLUSION

This has been the Court's second opportunity to emphasize the importance of cooperation in international law advanced by 28 U.S.C. § 1782. In today's world of international crimes and world-wide criminal enterprises, especially in the area of narcotics trafficking and money laundering, the nations of the world must work together to eliminate

---

4. The testimony produced during the evidentiary hearing clearly confirmed, however, the earlier determination that the Attorney General is an interested party within the meaning of 28 U.S.C. § 1782.

5. *John Deere Limited v. Sperry Corp., supra* at p. 136, fn.3.

sanctuaries for criminal activities and provide the production of relevant and sought-after evidence needed for successful prosecution. Congress took a giant step in fostering such cooperation through the enactment of 28 U.S.C. § 1782. Any interpretation of this statute which would defeat or minimize such commendable goals is counter-productive to the noble purpose of our Congress.

With these final observations uttered, the Motion for Relief from Judgment is denied, and, jurisdiction is returned to the Eleventh Circuit Court of Appeal for any further consideration in conjunction with the earlier Memorandum Decision filed herein.

DONE and ORDERED, in Chambers, at Miami, Dade County, Florida, this 29th day of September, 1987.

/s/ Thomas E. Scott

THOMAS E. SCOTT

UNITED STATES DISTRICT JUDGE

Copies mailed to
Counsel of Record